IN THE

Supreme Court of the United States

..... Term, 1946

No.....

WILBUR PAUL PATTERSON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

WALTER A. SHELLEY
Daytona Beach, Florida
Attorney for Petitioner

TABLE OF CONTENTS

Page

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Grounds for Applying 3

Statement 2

Specification of Errors to be Urged 7

Reason for Granting the Writ 7

1. The admissions received by federal officers from Petitioner were obtained in violation of his right to the assistance of counsel under the Sixth Amendment to the Constitution of the United States 9

2. The federal law as enunciated by the Supreme Court of the United States renders such admissions so obtained incompetent as evidence against the accused 12

3. The State Court of first instance and the Supreme Court of Florida were bound by the federal law so enunciated and failure to recognize and enforce the same constitutes violation of a federal Constitutional right reviewable by the Supreme Court of the United States on certiorari 14

Conclusion 16

TABLE OF CASE CITATIONS

	Page
Atkinson v. State, 132 Miss. 377, 96 So. 310	12
Hall v. Jordan, Tenn. 15 Wall. 393, 21 L. Ed. 72	15
McNabb v. U. S., supra, 318 U. S. 332, 87 L. Ed. 819, 63 S. Ct. 1037	14
Patterson v. State, Fla. 25 So. (2nd) 713	7
Powell v. Alabama, 287 U. S. 45, 77 U. S. 158, 53 S. Ct. 55, 84 A.L.R. 527, 23 C.J.S.	12
Walker v. State, 150 Fla. 476 8 So. (2nd) 22	12
Walters v. Commonwealth, 199 Ky. 182, 250 S.W. 839	15

IN THE

Supreme Court of the United States

..... Term, 1946

No.....

WILBUR PAUL PATTERSON,
Petitioner,

vs.

THE STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Wilbur Paul Patterson prays that a writ of certriorari issue to review a certain final decision of the Supreme Court of Florida, being the highest Court of the State of Florida, in the above entitled cause, said decision of said Court having been rendered and filed on May 11, 1946, denying petitioner's petition for rehearing of the opinion and decision of said Court, filed on March 19, 1946, affirming a conviction and death sentence of Petitioner for murder in the first degree by the Circuit Court of the Seventh Judicial Circuit of Florida for Volusia County.

OPINIONS BELOW

The opinion of Mr. Justice Sebring, of the Supreme Court of Florida, is reported in 25 So. (2nd) 713. The order denying petition for rehearing by said Court has not yet been reported. (Record Vol. 4, p. 919).

JURISDICTION

The decision of the Supreme Court of Florida denying petition for rehearing was rendered and filed on May 11, 1946. The jurisdiction of the Supreme Court of the United States is invoked under Sections 344 (b) and 350 Title 28, United States Judicial Code.

QUESTIONS PRESENTED

1. Whether admissions of guilt received from a federal prisoner by federal officers during interrogation of such prisoner immediately following his arrest by the same federal officers for a federal offense contained in a federal warrant, after such prisoner requests and is denied assistance of counsel by said federal officers, are obtained in violation of such prisoner's right to assistance of counsel under the Sixth Amendment to the Constitution of the United States.

2. Whether upon a trial of such prisoner in a State Court for murder in the first degree, such State Court is bound to recognize, respect and enforce accused's federal rights under said Sixth Amendment to the Constitution of the United States and exclude evidence of admissions so procured.

3. Whether the competency of alleged admissions of guilt procured by federal officers in a federal proceeding and offered, over timely objections, in a trial in a State Court involves a right, privilege or immunity specially set up and claimed under the Constitution of the United States.

GROUNDS FOR APPLYING FOR WRIT

1. The questions presented in this case are new and have not been determined by the Supreme Court of the United States and pose serious matters connected with the administration of criminal justice.

2. The decision of the Supreme Court of Florida, to which Court writ of certiorari from the Supreme Court of the United States is sought, involves an infringement of the provision contained in the Sixth Amendment to the Constitution of the United States, guaranteeing the assistance of counsel to the accused in all federal criminal prosecutions.

STATEMENT

In the early evening, before full darkness, of January 13, 1945, in Daytona Beach, Volusia County, State of Florida, Wilbur Paul Patterson using the alias, Pat Harris, was driving an Oldsmobile coupe south on U. S. Highway No. 1 en route to Orlando, Florida. With Patterson were two companions, Dan C. Smith, the owner of the car, and a girl acquaintance, Lacey Lee Laney. During the night before and for most of that day the three companions, including Petitioner, spent their time frequenting barrooms and drinking intoxicants in Daytona Beach and the Riviera Hotel in Ormond, Florida.

As the automobile driven by Patterson neared the southern City limits of Daytona Beach, an automobile, later identified as a City of Daytona Beach Police Department car but bearing no identifying marks as such, overtook them and the driver ordered Patterson to stop. Patterson pulled his car to his right hand side of the roadway while the unidentified automobile proceeded ahead, parking immediately south. Patterson, Smith and Lacey Lee Laney dismounted from their car as did the driver of the automobile that had stopped them. Dan C. Smith recognized the driver of the second car as being Harry F. Raines, a plain-clothes detective of the City of Daytona Beach Police Force and said he heard Raines address him by name while ordering them to get out of the car. When Raines approached Patterson the latter shot Raines five times with a pistol, killing him instantly. As Raines' body lay on the highway Lacey Lee Laney remained at the scene screaming, Dan C. Smith ran off into the darkness and later voluntarily gave himself up to the Police, while Patterson jumped back into the

Oldsmobile, whipped it around on the highway, and proceeded at a high rate of speed in the direction from whence they had come. With the help of certain individuals operating a Daytona Beach Night Club, Patterson was driven to Jacksonville, Florida, from which place he ultimately made his way alone to Omaha, Nebraska.

After Patterson had fled from the scene of his offense the Federal Bureau of Investigation obtained a federal warrant for his arrest in which he was charged with the offense of unlawful flight to avoid prosecution for murder (Record Vol. 3, p. 749). On February 13, 1945, a Grand Jury of Volusia County, State of Florida, indicted Patterson for murder in the first degree (Record Vol. 1, p. 2). On January 30, 1945, special agents of the Federal Bureau of Investigation arrested Patterson in Omaha Nebraska, upon the charge set forth in the federal warrant aforementioned (Record Vol. 3, p. 740).

Patterson's arrest took place at about 2:00 o'clock in the afternoon. He was taken by federal officers to their offices in the First National Bank Building in Omaha, Nebraska, for questioning (Record Vol. 3, p. 741), despite the fact that a United States Commissioner was available in Omaha, Nebraska (Record Vol. 3, p. 760) before whom the officers could have readily brought the accused. After disrobing Patterson the special agents of the Federal Bureau of Investigation, Flood and four or five others, commenced interrogating Patterson which interrogation proceeded until some time around 6:00 o'clock in the evening (Record Vo. 3, p. 760). The officers said that they wanted to talk to Patterson about the homicide; that he was not required to tell them about it; but if he did make a statement it could be used against him; and Patterson agreed to talk (Record Vol. 3, p. 742). Special agent Wiltsie wrote out in longhand on a manila pad Patterson's narrative account of the homicide. When it was completed it was handed to Patterson with a request to sign it (Record Vol. 3, p. 743-744). Patterson read it and after doing so asked whether he had to sign it and was told that he did not. He then said he would like to consult an attorney and was advised by the special agent, Flood, that he could not have an attorney at that time but could secure counsel after they had concluded questioning him (Record Vol. 3, p. 757). Accused then asked what the penalty for murder was in Florida and after being told that they, the federal officers, were unacquainted with

the Florida law but that the penalty for murder in any State is severe, Patterson signed the paper prepared by special agent Wiltsie (Record Vol. 3, p. 757).

It is of special importance to note the contents of the written confession (Record Vol. 3, p. 764); it contains no statements from which motive for the killing, state of mind, or animus of the accused can be inferred.

After Patterson's request for assistance of counsel was refused as stated, and Patterson had signed the written confession, the federal officers continued to interrogate him, during which subsequent questioning he was asked where he procured the pistol with which he killed Raines (Record Vol. 3, p. 767). Patterson's reply was to the effect, according to the Federal Bureau of Investigation agent, Flood, that he had obtained the pistol when he robbed a Mr. and Mrs. O'Rourk in their home in West Palm Beach, Florida, and took $4,500.00 from them (Record Vol. 3 p. 747). Patterson is also claimed to have related that he knew he was wanted for the O'Rourk robbery in West Palm Beach, realized Raines was a police officer seeking his arrest, and decided to shoot Raines rather than submit to arrest and probable prosecution for the robbery (Record Vol. 3, p. 748).

The trial opened in the Circuit Court of the Seventh Judicial Circuit of Florida in and for Volusia County at DeLand, Florida, on March 19, 1945. A motion for change of venue was denied; a jury was selected after two and one half days of examination of talesmen disclosing approximately seventy per cent of the veniremen examined disqualified for bias, although a jury was finally selected after Petitioner exhausted all his peremptory challenges.

At the outset of the trial counsel for Petitioner advised Court and jury that Petitioner admitted guilt of unlawful homicide but denied the killing to have been effected with premeditated design, thus confining the issue solely to that of murder in the first degree (Record Vol. 2, p. 466).

After sixteen witnesses for the State had been heard and the State had rested its case, Petitioner took the witness stand in his own behalf (Record Vol. 3, p. 654-737). Up to that time there was no evidence of motive for the killing in the record, Patterson gave his account of the homicide in which he denied

he knew Raines was a police officer but, on the contrary, thought him to be a member of a gang with whom he had had serious difficulty a few days previous (Record Vol. 3, p. 66). At no time during the course of his examination-in-chief did Patterson mention when, how or from whom he procured the pistol with which he shot deceased. On cross-examination the State Attorney, among other things, asked Patterson where he had secured the weapon used by him when he killed the detective and the Petitioner replied he had purchased it in Orlando from a man whom he did not know several weeks before the killing. The State Attorney, for the avowed purpose of impeaching the Petitioner as to his statement upon the matter of procurement of the pistol, asked Patterson whether he had not told the arresting officers that he obtained the pistol when he robbed Mr. and Mrs. O'Rourk in West Palm Beach, Florida, in their home and took $4,500.00 from them (Record Vol. 3, p. 724). The question was objected to by counsel for the Petitioner as being not in cross-examination of anything brought out by the examination in chief, and that the question propounded to him was palpably for the purpose of prejudicing the jury against the accused by unlawful reference to prior unconnected crimes allegedly committed by him. The objections were overruled and Petitioner denied making the statement to the federal officer (Record Vol. 3, p. 724-725).

On rebuttal and for the first time during the trial the State offered five so-called rebuttal witnesses including the federal officer, Flood, to prove a confession and the alleged admissions with respect to the West Palm Beach robbery. Preliminary examination of the federal officer was made by the State and counsel for the Petitioner in the absence of the jury (Record Vol. 3, p. 739). On cross-examination of federal officer, Flood it was developed that the admissions above mentioned were obtained after he and the other federal officers had denied Patterson the right to the advice of counsel and Patterson objected to the introduction of the alleged admissions on the ground that the same were taken in violation of his Constitutional rights to the advice of counsel (Record Vol. 3, p. 763-764-B-765). The objection was overruled and the admissions and confession were received in evidence in the presence of the jury.

On March 25, 1945, Petitioner was convicted as charged and sentenced to suffer the death penalty (Record Vol. 3, p. 849-855).

Motion for new trial was filed as provided by law in which the introduction of the alleged admissions into evidence in violation of the Petitioner's State and Federal Constitutional rights was incorporated (Record Vol. 3, p. 860). Motion for new trial was denied and the introduction of the admissions on the grounds aforesaid was made a part of the grounds of appeal to the Supreme Court of Florida (Record Vol. 3, p. 878-883). On brief and on oral argument before the Supreme Court of Florida, Petitioner argued the Constitutional questions aforesaid and the Supreme Court of Florida by its decision in Patterson v. State, Fla. 25 So. 2nd, page 713, determined and found contrary to Defendant's contention thereon.

Petition for rehearing was duly filed and the same was denied on May 11, 1946 (Record Vol. 4, p. 919). The cause is in the Supreme Court of the United States on petition for writ of certiorari in this cause.

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Florida erred:

1. In affirming the competency of evidence of alleged admissions of guilt by the accused in a murder case in a State Court, bearing directly upon the subject of motive and intent which said admissions were admittedly obtained by arresting federal officers while interrogating the accused in connection with a federal offense, in violation of the accused's right to assistance of counsel as guaranteed under the provisions of the Sixth Amendment to the Constitution of the United States.

2. In affirming the decision of the Circuit Court of Volusia County, Florida, holding the competency of alleged admissions received by arresting federal officers from the accused in connection with a federal offense was not ruled and governed by pertinent federal law.

REASONS FOR GRANTING THE WRIT

This case presents important new questions of federal law of vital importance to the fair administration of criminal justice. The issues presented in the State Court of first instance and in the Supreme Court of Florida involve substantial organic rights of a citizen of the United States to the assistance of counsel guaranteed under and by virtue of the provision contained in the Sixth Amendment to the Constitution

of the United States. Under the peculiar circumstances involved, it is contended here, as it was in the Court of first instance and in the Supreme Court of Florida, that the federal Constitutional right to assistance of counsel accruing in connection with a federal prosecution for a federal offense are enforceable in a State Court on a trial of the accused for a State offense.

Petitioner was charged in a State Court with the murder of a City Detective of the Daytona Beach, Florida, Police Force. The homicide was committed on January 13, 1945. On January 30, 1945, Petitioner was arrested in Omaha, Nebraska, by Special Agents of the Federal Bureau of Investigation. The federal officers made the arrest upon authority of a federal warrant theretofor procured by them charging Petitioner with the federal offense of unlawful flight to avoid prosecution for murder. Petitioner was indicted by a Volusia County, Florida Grand Jury on February 13, 1945, and placed on trial in that Court on March 19, 1945. No attempt was made by the defense at any time during the trial to seek acquital of Petitioner. On the contrary, the defense readily conceded the unlawful nature of the homicide and only contested the issue of premeditation (Record Vol. 2, p. 465). Without question there was no evidence, other than the admissions of the accused, offered by the State on the subject of premeditation, i.e.: motive, animus state of mind and intent. It, therefore, follows that the admissions of the accused offered by the State and filed in evidence over Petitioner's objections were of material and substantial importance to the verdict of guilty of murder in the first degree, and without such evidence said verdict would have been a legal impossibility. The Petitioner objected to the introduction of the alleged admissions into evidence against him upon the ground, among others, that the same were shown to have been obtained from him by the arresting federal officers contrary to his Constitutional rights to the assistance of counsel (Record Vol. 3 p. 763, 764-B, 765). Hence, the case presented resolves itself into three propositions: First, whether the admissions obtained from Petitioner by federal officers were in fact received by them in violation of Petitioner's right to the assistance of counsel as guaranteed under the provisions of the Sixth Amendment to the Constitution of the United States; Second, whether the federal law as enunciated by the Supreme Court of the United States renders such admissions so obtained incompetent as evidence against accused and; Third, whether

the State Court of first instance and the Supreme Court of Florida were bound by the federal law so enunciated and a failure to recognize and enforce the same constitutes the violation of a federal constitutional right reviewable by the Supreme Court on certiorari.

1. THE ADMISSIONS RECEIVED BY FEDERAL OFFICERS FROM PETITONER WERE OBTAINED IN VIOLATION OF HIS RIGHT TO THE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The above proposition is dependent upon two concurring factors: (A) whether Petitioner actually requested advice of counsel and (B) whether he was under the law entitled to counsel at the time of his arrest.

A. Petitioner was arrested by members of the Federal Bureau of Investigation about 2:00 p. m. on January 30, 1945, in Omaha Nebraska. They took him, not to a federal jail, but to the First National Bank Building in Omaha where the Federal Bureau of Investigation is said to maintain offices (Record Vol. 3, p. 741). The only authority for the arrest by the federal officers was the federal warrant procured by them in which Petitioner was charged with the federal offense of unlawful flight. Petitioner's arrest having been effected as stated, it is difficult to understand what further interest the federal officers had in the matter other than that of lodging him in jail. James L. Flood, one of the members of the Federal Bureau of Investigation in Omaha, Nebraska, and apparently the senior officer in charge, testified on the trial that the Federal Bureau of Investigation had no jurisdiction of the substantive offense of murder, as indeed it did not (Record Vol. 3, p. 749). Although Mr. Flood also admitted a United States District Court Commissioner was available in Omaha, before whom they could readily have taken their prisoner, Petitioner was nevertheless taken to the Federal Bureau of Investigation offices. There the officers disrobed accused and proceeded to question him (Record Vol. 3, p. 742). The questioning continued until sometime after 6:00 p. m., a matter of some 4 hours (Record Vol. 3, p. 760).

During the course of the interrogation by the federal officers Petitioner was warned of his Constitutional rights, as it were, and he consented to make a statement. It is clearly

apparent from Mr. Flood's testimony (Record Vol. 3 p. 740-767, that the primary purpose of Petitioner's interrogation was to secure a statement from him respecting the facts of the homicide and that it had nothing whatever to do with the offense for which they had arrested him. Petitioner related his version of the homicide which was written out in longhand by a special agent, Wiltsie, and handed by the officer with a pen to Petitioner for his signature (Record Vol. 3, p. 756-757). The written statement contained nothing except the bare facts of the homicide casting no light whatever upon Petitioner's mental status, his motive or animus at the time of the shooting. When Petitioner read the statement prepared by officer Wiltsie, he asked whether he had to sign it and was informed that he did not (Record Vol. 3, p. 757). Then Petitioner asked officer Flood whether he could have the assistance of counsel, that he wanted to call an attorney, and was told he could not have an attorney at that time for the reason that they, the federal officers, wanted to question him first (Record Vol. 3, p. 757).

An interesting and enlightening incident immediately followed: Petitioner asked his captors to tell him what the penalty for murder was in Florida and was advised by them that they were not familiar with Florida law but that the penalty for murder is severe in any State (Record Vol. 3, p. 757). Signature to the confession was then secured. This in itself indicates strongly that accused would have made no further statement had he known that the penalty for murder in Florida is death.

Apparently the officers were not satisfied with the mere confession, since the record clearly shows accused's request for assistance of counsel was denied because the officers desired to interrogate him further. At any rate the questioning continued after the confession was signed and the officers claimed Petitioner said he had obtained the pistol with which he shot the detective when he robbed a Mr. and Mrs. O'Rourk of some $4,500.00 in their home in West Palm Beach Florida; that he knew he was wanted for prosecution for that offense when the detective stopped him, and that he shot the police officer to avoid prosecution for that robbery (Record Vol. 3, p. 747-748). It is our contention that the alleged admissions, the substance of which have just been stated, were incompetent as evidence against Petitioner because they were secured after

the officers admittedly violated his Constitutional right to assistance of counsel. This contention was raised in the Court of first instance by appropriate objections (Record Vol. 3, p. 763, 764-B, 765). in the motion for new trial (Record Vol. 3, p. 856), in the grounds of appeal (Record Vol. 3, p. 878), and presented to and argued in the briefs and oral arguments before the Supreme Court of Florida. For these reasons, we submit, proper record predicate requisite to review of the decision of the Supreme Court of Florida by the Supreme Court of the United States cannot be successfully debated.

This case is unique in that the record discloses the arresting federal officers ADMIT denial of Petitioner's request for assistance of counsel. Officer Flood's testimony (Record Vol. 3, p. 740 to 767) fully bears out our assertion in this respect. Flood attempted to evade such a concession but was compelled to admit Petitioner in fact asked to be allowed to consult counsel and was told he could not do so until after the fficers had concluded questioning him (Record Vo. 3, p. 757). Flood's lame explanation of his reason for not permitting Petitioner to consult an attorney was that accused asked for no particular lawyer. But he said he did not inform accused that that was the reason for the refusal, nor did he request accused to name some certain lawyer, and in no way explained why, in response to accused's request for legal assistance, he replied, "Not at this time" (Record Vol. 3, p. 757). Petitioner was 22 years of age at the time of his arrest and had had no formal education beyond the seventh grade (Record Vol. 3, p. 655). In our judgment it is the essence of fairness to assume that Petitioner understood Mr. Flood to mean precisely what he said, that he, accused, was not entitled to counsel at that time. Hence, we insist that Petitioner was admittedly denied assistance of counsel.

B. The Sixth Amendment to the Constitution of the United States provides that in all criminal prosecutions, the accused shall have the right to assistance of counsel. Similar provision is made in Section 11 of the Declaration of Rights contained in the Constitution of the State of Florida. There is some divergence of opinion in the books as to when the right to assistance of counsel accrues, but, we submit, in the case at bar, there can be no doubt of Petitioner's right to counsel at the time of his arrest because the warrant for unlawful flight was most centainly the commencement of a criminal prosecution against him within the meaning of both State and Federal

Constitutional provisions. The Supreme Court of the United States, in Powell v. Alabama, 287 U. S. 45, 77 U. S. 158, 53 S. Ct. 55, 84 A.L.R. 527, speaking through Mr. Justice Sutherland, said:

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissable. He lacks both the skill and knowledge adequately to prepare his defense even though he have a perfect one. **He requires the guiding hand of counsel at every step in the proceedings against him.**"
>
> (Emphasis supplied)

See also: 23 C.J.S. (Criminal Law) Sec. 979, p. 319; Walker v. State, 150, Fla. 476, 8 So. (2d) 22.

Arrest pursuant to warrant therefore is a "step" in the prosecution. Under the law of at least some States the limitations upon commencement of criminal prosecutions is specifically tolled by the issuance of a warrant (Atkinson v. State, 132 Miss. 377 96, So. 310). The weight of authority, construing Constitutional provisions similar to that contained in the Federal Constitution, is to the effect that the accused is entitled to services of counsel from the time of his arrest (23 A.L.R. 1382).

2. THE FEDERAL LAW AS ENUNCIATED BY THE SUPREME COURT OF THE UNITED STATES RENDERS SUCH ADMISSIONS SO OBTAINED INCOMPETENT AS EVIDENCE AGAINST THE ACCUSED.

We rely upon the rule announced by the Supreme Court of the United States in McNabb v. United States, 318, U. S. 332, 87 L. Ed. 819, 63 Ct. 1037, to the effect that although a confession may be the ostensibly free and voluntary act of the accused, yet if the arresting officers who obtain it do so in the course of a violation of a substantial statutory right of the accused the unlawful conduct vitiates the legality of the confession as evidence. The McNabb case has met with criticism

by members of law enforcement agencies, including the Federal Bureau of Investigation. However, the learned opinion of Mr. Justice Frankfurter strikes at the root of third-degree practices and, in recognition of the high duty of the judiciary to decline to stultify itself through condonement of such illegal practices by over-zealous officers, engrafts a new rule in the law of evidence applicable to prosecutions in Federal Courts.

In the instant case it is admitted and undenied on the record that the arresting officers denied Petitioner's request for assistance of counsel at a time when it was his lawful and constitutional right to have such assistance. In the McNabb case, the officers violated the accused's statutory right to be taken without unreasonable delay before a magisctrate. Here, the violation was a far more serious one; denial of accused's constitutional right to assistance of counsel.

Mr. Justice Sebring, speaking for the Supreme Court of Florida, in the decision in this case, said:

> "We fully recognize that a person charged with crime has certain fundamental rights which must be protected, and that among these is the right to representation by counsel. Walker v. State, 150 Fla. 476, 8 So. 2nd. 22. We do not understand the law to be, however, that under the circumstances shown here the defendant immunizes himself against the effect of prior incriminating admissions freely and voluntarily given simply by reason of the fact that during the course of the examination he requests, in a general way, that the arresting officers procure him the services of a lawyer without requesting any particular attorney."

The record does not bear out the factual situation upon which Mr. Justice Sebring's quoted statement is bottomed. Petitioner did not at any time request the federal officers to procure him the services of a lawyer, in a general way or otherwise. He simply asked them whether he could have the services of counsel, that he wanted an attorney, and was told that he could not AT THAT TIME and by that was given to understand he was not entitled to counsel until after the officers had concluded with him. Certainly there is nothing in that to suggest accused requested, in a general way, that arresting officers procure services of a lawyer for him. In addition,

the language quoted from the decision does not follow the facts involved when it asserts Petitioner's request for assistance of counsel occurred AFTER he had made prior voluntary incriminating admissions. We submit that a most casual reading of Mr. Flood's testimony (Record Vol. 3, p. 740 to 767 discloses the admissions of guilt complained about were alleged to have been made by Petitioner AFTER he had been told he could not have an attorney's advice. For these reasons we unhesitatingly say that the Supreme Court of Florida misconstrued the factual situation disclosed by the record. The misconception of the facts was directly brought to the attention of the Supreme Court of Florida by Petitioner in the Fifth, Sixth, Seventh and Tenth grounds of the petition for rehearing (Record Vol. 4, p. 910), each of which clearly and distinctly pointed out the error.

The decision of the Supreme Court of Florida did not, therefore deny the applicability of the rule laid down in McNabb v. U. S. 318 U. S. 332, 87 L. Ed. 819, 63 S. Ct. 1037 to the factual situation involved in the case; it merely suggested that the denial of one's right to service of counsel requested in a general way after freely admitting incriminatory matters did not work an immunization against the effect of such adimssions as evidence.

3. THE STATE COURT OF FIRST INSTANCE AND THE SUPREME COURT OF FLORIDA WERE BOUND BY THE FEDERAL LAW SO ENUNCIATED AND FAILURE TO RECOGNIZE AND ENFORCE THE SAME CONSITUTES A VIOLATION OF A FEDERAL CONSTITUTIONAL RIGHT REVIEWABLE BY THE SUPREME COURT OF THE UNIED STATES ON CERTIORARI.

The McNabb decision, supra, has no application to prosecutions in State Courts; it distinctly confines the rule to prosecutions in the Federal Courts. However, had the situation occurred in a Federal Court on the trial of Petitioner for the federal offense, the McNabb rule would clearly apply. On Petitioner's trial in the State Court we were confronted, then, with the matter of the competency of evidence obtained in a federal proceeding, by federal officers and involving a different cause of action. Under those conditions the competency of such evidence depends upon the appropriate federal law

(Hall v. Jordan, Tenn., 15 Wall. 393 21 L. Ed. 72).

For example, if it had been a matter of determining the legality of a federal search warrant, upon authority of which evidence had been obtained by federal officers and sought to be introduced on a trial in a State Court, it would be necessary to establish the legality of the search warrant under the federal law (Walters v. Commonwealth, 199 Ky. 182, 250 SW. 839). The McNabb decision, as that case definitely states, presents judge-made law of evidence on the subject of the competency, not the admissibility, of confessions offered in federal prosecutions.

The right of Petitioner growing out of the denial of assistance of counsel by the federal officers derives directly out of and from the Sixth Amendment to the Constitution of the United States. The State Courts were bound to recognize and enforce that right (36 C.J.S. (Federal Courts) Sec. 270, p. 172-173).

This case is to be distinguished from those in which it has been held that tangible evidence illegally obtained by State officers and delivered to federal officers is admissable in evidence on trial in a federal Court, because those cases are bottomed on the proposition that the federal officers committed no wrong in the procurement of evidence. In the case at bar, a much different situation is presented. A federal officer himself offered evidence of admissions of the accused obtained by him, a federal officer, in the course of his official duty in a federal cause in direct violation of the accused's Federal Constitutional right to assistance of counsel. It is conceded that there can be no review of a State Court decision based on matters pertaining to the admissibility of evidence in such State Court, but we are not concerned, in the instant case, with mere admissibility of the challenged admissions; the challenge goes far deeper than that and strikes at the legal competency of such evidence under the provision of the Federal Constitution guaranteeing the assistance of counsel in federal prosecution for crime. The federal question involved on the subject of the competency of the alleged admissions was, therefore, inalterably fixed and joined with the proffer of the challenged admissions and appropriate objections and exceptions were saved throughout the whole of the State Court litigation.

CONCLUSION

In a long list of decisions by the Supreme Court of the United States it has been at least strongly intimated that assistance of counsel is a right which accrues from the time of the arrest of the accused. For instance, in the McNabb case, supra, it was said (p. 355 U. S.):

> "They (the McNabbs) were not permitted to see relatives or friends who attempted to visit them. They had no lawyer. There is no evidence that they requested the assistance of counsel, **or that they were told that they were entitled to such assistance.**"

(Parenthesis and emphasis supplied)

However, it does not appear that the Supreme Court of the United States has ever been called upon to decide the effect of a positive denial of assistance of counsel upon the legality of after-acquired admissions of guilt; the basic problem presented on this proceeding.

To those who hold the opinion that the admissibility of confessions as evidence must depend solely upon the determination of their voluntary character as a matter of fact, the contentions here presented will seem devoid of all merit. But a fair perspective of the practical aspects of the use of confessions as evidence in American criminal prosecutions has compelled the consideration of factors other than the mere unfettered volition of the confessor.

One of such considerations, and perhaps a no more fundamental one could arise under our system of jurisprudence, occurs in the instant case. If a citizen is entitled to assistance of counsel from the moment of his arrest, and we insist he is, what should be done about a wilful denial of that right? To say it bears no relation to coercion and, without the latter, in some form, a confession or admission made thereafter is legally competent as evidence, is to render the right unenforceable and a mere meaningless expression in words. The only practical and realistic result of a purposeful denial of the assistance of counsel should be the nullification of any advantage over the citizen obtained subsequent thereto. In the case at bar the prime purpose of the interrogation was to obtain a

confession, the officer, Flood, says as much when he, in effect, told Patterson, "We want to talk to you about this, and we want the truth." (Record Vol. 3, p. 755). The officers knew perfectly well that the presence of any attorney for Petitioner would threaten the accomplishment of their purpose, so they obviated that obstacle by telling him he was not entitled to counsel until after they had finished with him. There is no other possible plausible reason for their action.

All of the other controversial occurrences arising on the trial have been foreclosed by the decision of the Supreme Court of Florida. Nothing stands in the way of execution of the sentence save this proceeding. The substance of the contentions raised in this Petition were of first and paramount importance on the trial of the cause. They were resolved against Petitioner by the State Court, and in so doing adjudicated the federal question hereinbefore set forth.

We respectfully submit the writ of certiorari to the Supreme Court of Florida should issue for the reasons advanced.

Walter A. Shelley

Attorney for Petitioner